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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1039

WILLIAM C. HAAS & CO., INC.,
Petitioner,

vs.

CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, William C. Haas & Co., Inc., prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered on October 4, 1979

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit appears as Appendix "A" and is reported at 605 F.2d 1117 (9th Cir. 1979).

The order and judgment of the United States District Court for the Northern District of California are not reported. They appear hereto as Appendix "B". No written opinion other than the order and judgment was entered by the trial court.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Ninth Circuit was handed down and entered on October 4, 1979. A petition for rehearing was not deemed practical, and therefore one was not filed. This Petition for Certiorari is being filed within ninety days of the entry of judgment. Accordingly, jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN SUSTAINING THE TRIAL COURT'S ORDER OF SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS ON THE TAKING ISSUE HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A MANNER WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.
2. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN SUSTAINING THE TRIAL COURT'S ORDER OF SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS ON THE TAKING ISSUE HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This action involves construction of the Fifth and Fourteenth Amendments of the Constitution of the United States as well as Rule 56(c) of the Federal Rules of Civil Procedure. The pertinent text of these provisions is set out verbatim in Appendix "C".

STATEMENT OF THE CASE

This action was filed in April, 1975 in the United States District Court for the Northern District of California. Jurisdiction was based concurrently on diversity of citizenship and federal question as provided for in 28 U.S.C. Sections 1332 and 1331.

Parties

Petitioner herein (Plaintiff and Appellant below) is William C. Haas and Co., Inc. Respondents herein (Defendants and Appellees below) are the City and County of San Francisco, California. For reasons of clarity, the parties will be referred to hereafter as "Haas" and "the City" respectively.

Nature of Case

The basic issue involved herein relates to whether or not the City, through the enactment of amended zoning, height and bulk restrictions and various other regulations synonymous with the police power, has so far limited the use of Haas' property and so far depreciated its value as to have committed a taking for which Haas must be compensated in accordance with the provisions of the Fourteenth Amendment to the United States Constitution.

Disposition by Trial Court

On May 4, 1977, the Trial Court granted the City's Motion for Summary Judgment in a one page, one paragraph Order. Formal judgment was entered on May 19, 1977 whereby Haas' Complaint was dismissed. A Notice of Appeal was timely filed by Haas and the record was submitted on July 11, 1977.

Disposition by Appellate Court

The jurisdiction of the United States Court of Appeals for the Ninth Circuit was invoked pursuant to 28 U.S.C. 1291 and perfected in accordance with Rule 4 of the Federal Rules of Appellate Procedure. Briefs were filed, and following oral argument, the Court of Appeals on October 4, 1979 affirmed the judgment of the District Court.

STATEMENT OF FACTS

On June 28, 1971, Haas entered into an agreement with the American Savings and Loan Association to purchase 52,868.75 square feet of land in the Russian Hill neighborhood of the City of San Francisco, California. The land purchase agreement was conditioned upon Haas' procurement of a valid site permit from the requisite City agency.

On July 7, 1971, Haas made application to the San Francisco Planning Commission for a site permit. Permission was sought for the construction on the Russian Hill property of an apartment building, 343 feet in height, which would provide 280 luxury dwelling units. The property is bounded by Larkin on the West, Hyde on the East, Lombard on the South and Chestnut on the North. At the time Haas sought permission for construction, the land was situated in an R-5 zoning district that permitted

highrise development. The land had been vacant and unimproved for more than a 15 year period preceding the permit application.

Since November, 1970, the proposed development had been under consideration and in the process of planning by Haas. In all respects, the proposed development conformed with the R-5 zoning classification then in existence and no variance or conditional permit of any kind was requested or required. At the time of the application, there were no applicable height and bulk controls. Height and bulk requirements were exclusively controlled by floor-area ratio provisions of the City Planning Code.

Though the Haas proposal was well within the perimeter of the R-5 zoning district, the City Planning Commission did not give ready approval, but chose instead to exercise its asserted right of discretionary review. After analysis by the staff of the Planning Department and public hearing, the Commission denied Haas' application by Resolution No. 6743 dated August 12, 1971. It was the opinion of the Commission that the proposed building did not conform to the *then unadopted* Urban Design Plan and would have a massive impact and extraordinary effect upon San Francisco and Russian Hill in particular.

The Urban Design Plan was the end result of a study undertaken in 1969 by the Department of City Planning for the purpose of setting down coherent and comprehensive urban design policies to provide San Francisco's planning program with direction. The Plan was first introduced in draft form by the Department of City Planning in 1970, and during the following year, the Planning Commission held public hearings on the various components of the proposed policy. Specifically as directed to Russian Hill, the proposed Plan noted the harmonious balance between low and tall structures. The Plan stated

that increasing the height of buildings toward the top would emphasize the hill form and set Russian Hill apart from other high areas to the south and west. (Tr. 53, 235)

Haas appealed the denial of his application to the Board of Permit Appeals for the City on August 13, 1971. While this appeal was pending, the Planning Commission, on August 26, 1971, adopted pursuant to Resolution No. 6745, the Urban Design Plan, as part of the Master Plan of San Francisco. At the same time, Resolution No. 6746 was adopted by the Commission, specifically declaring its intention to reclassify property throughout the City and specifically adopting Interim Height and Bulk Controls. These Interim Controls did not amend the applicable zoning law. However, pursuant to Section 302(e) of the Planning Code, the resolution, with its intention to reclassify, did have the effect of imposing on applications filed subsequent to the resolution, a requirement of conformance with these controls. The Interim Controls provided for, among other things, an absolute 300-foot maximum height in the R-5 zoning district where the Haas property was located. A 300-foot maximum could be granted by the Planning Commission upon special review for structures in the nature of a point tower. Otherwise, the maximum allowable height was forty (40) feet. The Haas application was made prior to the adoption of the Interim Controls.

On September 13, 1971, after numerous conferences with the Planning Department staff and meetings with representatives of the Russian Hill Improvement Association, Haas presented for the consideration of the Board of Permit Appeals a modified proposal. It called for construction of two towers, 37 and 32 stories respectively, which would provide 400 dwelling units. On October 15, 1971, Haas further modified its plan and submitted a two tower proposal, each tower to be 31 stories and 300 feet in height, providing 379 dwelling units.

On October 15, 1971, Haas withdrew its appeal at the urging of the Planning Department and representatives of the Russian Hill Improvement Association. Haas agreed to return to the Planning Commission for a discretionary review of the two point tower proposal.

On November 9, 1971, still another modification was submitted to the Planning Commission, providing for two point towers, of 37 stories (335 feet), and 25 stories (235 feet), and for 379 dwelling units. Haas conferred with the Planning Department several times and met with representatives of the Russian Hill Improvement Association with respect to the proposal.

On January 13, 1972, the Planning Commission held a public hearing of almost five hours with respect to the Haas application. In the course of that hearing, Haas agreed to reduce the height of the higher tower from 355 feet to 299.4 feet and the number of dwelling units from 379 to 343. This alternative gained acceptance. After more than six months of consideration and negotiation, two lengthy public hearings and an extensive record, the Planning Commission approved Haas' application by Resolution No. 6799. This resolution provides in pertinent part:

> "WHEREAS the majority of the Commission finds and declares that the proposal submitted by the applicant on January 13, 1972, is a reasonable development of the subject R-5 zoned site, and is in conformity with the principles and policies of the current Urban Design Element of the Master Plan; and the Interim Height and Bulk Controls adopted by the City Planning Commission on August 26, 1971.
>
> THEREFORE, BE IT RESOLVED that the City Planning Commission, after due consideration and in its

discretion, does hereby APPROVE the amended plans submitted to the Commission at its hearing on January 13, 1972, and to be filed under said Building Application No. 398946, for one 300-foot residential tower and one 235.4-foot tower containing a maximum of 343 dwelling units, and are to be in full conformity with applicable City Planning Code provisions for an R-5 zoning district."

In the opinion of Haas, this final plan provided a substantial compromise of what it believed could have been built under the existing zoning laws.

Between January 13, 1972, and February 15, 1972, the Haas application for a site permit was reviewed in the ordinary course of procedure by the City's Bureau of Fire Prevention and Public Safety, Civil Engineer, Bureau of Building Inspection and Bureau of Engineering for compliance with applicable ordinances.

On February 15, 1972, the Haas Company paid the City and County of San Francisco the sum of $36,918.50 and was issued the approved site permit, Building Permit No. 363687.

Two days later, on February 17, 1972, the Planning Department presented to the Planning Commission a draft ordinance which proposed a 250-foot height limit in certain R-5 zoning districts, including Russian Hill. Without passing on the merits or adopting the proposed limits as interim controls pursuant to Section 302(e), the Commission, by Resolution No. 6811, included the proposed ordinance for public hearings.

Appeals from the Planning Commission's decision granting the Haas application were filed by the Russian Hill Improvement Association, San Francisco Opposition and Lombard Hill Improvement Association. The appeals

were consolidated for hearing by the Board of Permit Appeals. On February 28, 1972, based on a public hearing, the very substantial record of the proceedings before the Planning Commission, and prior consideration of the matter by the Board itself, which even included inspection of the building site, the Board of Permit Appeals concurred in the decision and order of the Planning Commission. A separate Notice of Decision and Order in each of the appeals, dated February 28, 1972, provided that the requested permit be granted and issued, and stated:

"Concurring in the Planning Commission's views on compliance with the current Urban Design Element of the Master Plan, and the Height and Bulk Controls and finding that the granting of said permit is in compliance with all applicable laws, rules and ordinances, the said order was concurred in by the said Board of Permit Appeals on February 28, 1972."

Requests by Russian Hill Improvement Association and San Francisco Opposition for a rehearing were denied by the Board of Permit Appeals on April 10, 1972.

The Haas Company was contractually obligated to purchase and make full payment for the property within seven days after the site permit became final on April 10, 1972. Haas accordingly purchased the site on April 17, 1972, for the cash sum of $1,650,000.00. Payment was also made on a real estate broker's commission of $150,000.00, real estate taxes of $8,693.42 and documentary stamp transfer tax, recording fees and other escrow costs of $6,560.04, for a total expenditure of $1,815,253.46.

On April 20, 1972, the Russian Hill objectors filed a Petition for Writ of Mandate with the Superior Court of California. The objectors wanted the Court to invalidate the Haas permit because the Planning Commission and

Board of Permit Appeals failed to prepare, file or consider an Environmental Impact Report (EIR) in compliance with the Public Resources Code of California. Section 21000 et seq.

The suit was styled as *Russian Hill Improvement Association, et al. v. Board of Permit Appeals, Haas, et al.*, No. 645-095. The actions of the Planning Commission and Board of Appeals were defended in this suit. It was asserted by the Board and Haas that an EIR was not required of private permits and that even if it was, substantial compliance with the California Environmental Quality Act (CEQA) had been met.

Haas was successful at the lower court level. This decision later was reversed by the California Court of Appeals, with the latter Court upheld by the Supreme Court of California. On June 23, 1975, certiorari was denied by the Supreme Court of the United States. The site permit was invalidated.

While the EIR litigation was pending, the Planning Commission adopted a 40-foot height limitation in the Russian Hill area.

Subsequent to this suit, the City has commenced yet another downzoning of the Haas property. On May 20, 1976, interim density controls went into effect under Section 302(e) of the Planning Code which placed the Haas property in an RH-3 district. In the opinion of Haas, this latest classification changes the Russian Hill area from an "apartment concept" to that of a "house character". These new density regulations allow only one dwelling unit per each 1,000 square feet of lot area, and will permit at the most, construction of three-family dwellings.

With the reduction from permissible 299 foot high towers to 40 foot high towers, the value of the Haas land,

according to Haas, was diminished to such a degree as to make any present or future development economically prohibitive. An appraisal report, executed by Dale F. Farnow on behalf of Haas, indicates that the total loss in gross building area resulting from the 40 foot height limitation was 291,966 square feet. Mr. Farnow showed in his report that the gross area of the planned 299 foot high towers was 410,937 square feet. Farnow stated that the gross area of 40 foot high towers would be 118,970 square feet, thereby arriving at the figure of 291,966 square feet as the loss in gross building area resulting from the height reduction. Farnow also indicated in his report that the land was worth $30.00 per square foot if all of the 410,937 square feet in building area could be utilized as planned. Farnow stated that such a figure would represent 100% of the land's value. Utilizing only 118,970 square feet, as dictated by the 40 foot heght restriction, Farnow stated that the land was worth $8.70 per square foot or 29% of its original value. Further, Haas alleged in Exhibit C of its Complaint it was Mr. Farnow's opinion that the value of the Haas property would further decrease to less than 20% of the remaining 29% if the present three-family zoning restrictions were continued. In the opinion of Haas, this final reduction would decrease the value of the land to $94,800.00 or less.

William C. Haas, president of Haas, stated in his affidavit that he had been in the appraisal and management field for more than 30 years. Mr. Haas stated that the basic concept of land purchase is to buy land at a cost commensurate with the proposed construction. Mr. Haas emphasized that one could not feasibly or realistically develop $2,000,000.00 worth of land for the now permitted uses under the RH-3 40-foot height classification. Mr. Haas concluded that no reasonable beneficial use of the

land remained. Supplemental suggestions in opposition to Summary Judgment were filed by Haas revealing a study done by Haas with the McHugh Properties, Inc. of San Francisco. This study projects the costs and return on the construction of 15 townhouses, with approximately 2,800 square feet to each unit. Haas asserts that construction of 15 townhouses would represent the greatest number of luxury-type residential units that could be built on its property and that such use would be the only possible choice in keeping with the surrounding decor and quality of Russian Hill. The study concludes by stating that risking another $4,000,000.00 for construction of 15 luxury townhouses would produce a loss of $138,680 based upon realistic calculations and still provide for no return on the land.

REASONS FOR GRANTING THE WRIT

I.

A Writ of Certiorari Should Issue Since the United States Court of Appeals for the Ninth Circuit in Sustaining the Trial Court's Order of Summary Judgment in Favor of Respondents on the Taking Issue Has Decided an Important Federal Question in a Manner Which Conflicts With Applicable Decisions of This Court.

The Fifth Amendment to the United States Constitution provides in relevant part that private property shall not be taken for public use without just compensation. It has been held through selective incorporation that the Fourteenth Amendment imposes a similar obligation on the states. *Chicago, B. & Q. R.R. v. Chicago,* 166 U.S. 226 (1897). Accordingly, when government seeks to take private property to benefit the public, as for a school

or airport, it utilizes the power of *eminent domain* going through the procedure of condemnation and paying out just compensation.

Another power that rests with government is the police power which involves the regulation of private property to prevent its use in a manner that is detrimental to the public health, safety or welfare. Under the police power, government may impose very substantial restrictions on private property even though such restrictions produce a severe diminution in the property's value. In several instances, this severe diminution will go uncompensated as "the price of living in a modern, enlightened and progressive community". *Hecton v. People,* 130 Cal. Rptr. 230 (Cal. App. 1976) at l.c. 233. In other instances, the circumstances in which regulation invades private property will be adjudged extreme and a taking will be found requiring just compensation. *Pennsylvania Coal v. Mahon,* 260 U.S. 393 (1922).

In deciding when a purported exercise of the police power rises to the standard of a taking, it is universally recognized (even in California) that Justice Holmes' opinion in *Penn Coal* is the guiding light. *Bank of America National Trust & Savings Asso. v. Town of Atherton,* 140 P.2d 678 (Ct. App. 1943); *Kopetzke v. County of San Mateo,* 396 F. Supp. 1004 (N.D. Cal. 1975); *Pete v. United States,* 531 F.2d 1018 (U.S. Ct. of Claims 1976); *Arverne Bay Construction Co. v. Thatcher,* 15 N.E.2d 587 (N.Y.App. 1938). In formulating a basic premise for when a regulation ends and a taking begins, Justice Holmes offers these words at l.c. 415 of his opinion:

> "The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. . . . In general it is not plain that a man's misfortunes or

> necessities will justify his shifting the damages to his neighbor's shoulders. . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change . . . this is a question of degree—and therefore cannot be disposed of by general propositions."

Of course, it matters not that the form of the regulation is zoning, interim controls or the like, as compensation under the Constitutional provisions of Amendments Five and Fourteen are not limited to any set classification or category of governmental interference. *Bank of America,* supra; *Pete,* supra.

The question then becomes *when* under the general rule enunciated by Justice Holmes will it be said that a regulation "goes too far". Indeed, this proposition has provided the proverbial "rub" in the taking cases decided by this Court.

In *Hadacheck v. Sebastian,* 239 U.S. 394 (1915), this Court upheld the government's position and sanctioned a regulation that diminished the value of the plaintiff's property from $800,000.00 to a mere $60,000.00. In that case, the use invoked by the owner was clearly a threat to the health of the general public in that his business could not be conducted in a sanitary manner. In permitting the state to put such a burden on the landowner, this Court recognized the importance of preventing harm to the public health by prohibiting a noxious use of property. *Mugler v. Kansas,* 123 U.S. 623 (1887); *Reinman v. Little Rock,* 237 U.S. 171 (1915).

Seven years later, in *Nectow v. Cambridge,* supra, this Court provided a different focus. The government

entity involved, relying on the general validity of comprehensive zoning as expressed in *Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926), zoned the city into three distinct districts: residential, business and unrestricted. Presumably the objective of the plan was to provide continuity on the overall design of the city. However, as such plan affected the plaintiff, it was quite severe. Plaintiff's land had been zoned to permit business and commercial use and a contract for a substantial amount had been signed for the sale of the land. The new zoning regulations placed Plaintiff's property in a residential district and as a result his contract fell through. Conceding the general validity of the comprehensive zoning scheme, Plaintiff attacked the regulation as a taking when applied specifically to him. Justice Sutherland, for the Court, first cautioned that governmental power to interfere with the landowner's use of property through zoning is not unlimited and to sanction such interference the regulation in question must bear a *substantial* relation to the public health, safety, morals or general welfare. In balancing the relevant factors, Justice Sutherland upheld the master's findings that the danger to the community's welfare interest by Plaintiff's proposed use was minute and certainly had no substantial adverse effect on health, safety or morals. In emphasizing the landowner's dilemma, this Court acknowledged that no practical use of the land could be made under the present zoning restriction in that there would not be an "adequate return" on the amount of any investment for development. A taking was found and relief granted by way of holding the comprehensive scheme inapplicable to the complaining landowner.

Nectow is of great interest because it demonstrates that when one leaves the area of noxious uses such as was present in *Hadacheck,* supra, the needs of the state be-

come less compelling and greater attention is centered on the landowner. In *Nectow* the aim was on the element of "reasonable remaining use" and this was equated with the notion of an adequate return on investment made for development. In this sense, *Nectow* provides a looking glass for the problems projected in the instant case. With Haas, we do not have compelling life and health factors being raised as objectives of the amended zoning. Yet, as applied to Haas, we visualize an awful burden in that NO return can be made upon ANY development under the existing regulations. As such, there certainly would remain a genuine issue of material fact as to whether or not all reasonable beneficial uses of the property have been precluded.

In *Penn Coal,* supra, handed down two years after *Nectow,* the Supreme Court again found the governmental objectives wanting. The validity of the statute as a whole was challenged, however, at l.c. 414 of his opinion Justice Holmes made it clear:

> "If we were called upon to deal with plaintiff's position alone we should think it clear that the statute does not disclose a public interest (prevention of mining of coal under private dwellings) sufficient enough to warrant so extensive a destruction of defendant's constitutional rights (use and benefit sought and obtained by contract)."

Justice Holmes did not see compelling health and safety factors, as existed in *Hadacheck*, and he specifically recognized the extent of diminution as a highly relevant factor in the balancing determination.

The more recent cases of *Goldblatt v. Town of Hempstead,* supra, and *United States v. Central Eureka Mining Co.,* 357 U.S. 155 (1967), both reaffirm the significance

of the diminution in value caused by the regulation. The *Goldblatt* Court, while recognizing that one is not entitled to the most beneficial use of his land under the Constitution, still acknowledged that a comparison of values before and after the regulation is relevant. As in *Hadacheck,* the *Goldblatt* Court permitted the burden to be placed on the landowner primarily because there were significant safety concerns on the part of the public and because there was no showing anywhere in the record that the imposition of the ordinance would reduce the value of the land in question. In the instant case, of course, there is substantial evidence of extensive diminution. The record shows the fair market value of the land in question at $2,000,000.00 before the regulations and only $100,000.00 after.

In the most recent decision by this Court on the taking issue, *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104 (1978), the issues raised in *Hadacheck, Nectow, Penn Coal* and *Goldblatt* were examined once again. Although *Penn Central* dealt with a Landmark Preservation Law, the key issue as to whether or not there was a denial of substantive due process turned on whether the restrictions imposed by the Landmark Law deprived Penn Central of a "reasonable return" on the privately created and managed Terminal. In following the lead of the Court of Appeals of New York, this Court found that Penn Central had failed to show that they could not earn a reasonable return on their investment. (See *Penn Central* at l.c. 121).

Notwithstanding a decision denying that a taking had occurred, *Penn Central* is important because it reiterates that "reasonable return on investment" is a necessary factor in determining whether or not a regulation has gone too far as applied to the individual landowner. After discussing the issue of commercial impracticability as set out

in *Penn Coal,* Justice Brennan writing for the Court in *Penn Central* gave credence to the economic factor when he stated at l.c. 136 of his opinion:

> "*More importantly,* on this record, we must regard the New York City law as permitting Penn Central not only to *profit* from the Terminal but to obtain a *'reasonable return' on its investment.*" (Emphasis added)

The dissent in *Penn Central* as expressed by Justice Rehnquist and joined in by Chief Justice Burger and Justice Stevens also recognized the importance of the economic factor when at l.c. 149 of that opinion it was stated: ". . . the inability of the owner to make a reasonable return on his property requires compensation under the Fifth Amendment."

Another decisive consideration in a taking case is whether the owner of the regulated property, if uncompensated, would be contributing more than his proper share to the public undertaking. The burden and benefits of the regulation must be reciprocal. *Bacich v. Board of Control of California,* 144 P.2d 818 (Cal. 1943).

The dissent in *Penn Central* showed concern for this consideration when at l.c. 147 of that opinion they pointed out that the multi-million dollar loss suffered by the Penn Central Transportation Company was uniquely felt by that landowner without being offset by a corresponding benefit. The dissent goes on to state at l.c. 147: "It is exactly this imposition of general costs on a few individuals at which the 'taking' proposition is directed."

It is clear from the case law set out above that: (1) A regulation may go so far as to amount to a taking; (2) What is "too far" is a factual question of reasonableness based on the particular circumstances of each case; and (3)

Several relevant facts go into deciding the issue of reasonableness. It is also clear that of these several factors to be balanced in deciding the issue of reasonableness, one of the most essential is economic, i.e.: (A) The extent of diminution caused; (B) The possibility of a remaining use that is profitable; and (C) The economic feasibility of further development in light of a just return on one's initial investment.

A thorough reading of the record made in the trial court and the opinion handed down by the Ninth Circuit indicate that the economic factor was not properly considered and balanced with the other criteria that must be examined in a taking case. The Ninth Circuit in its opinion at l.c. 1120 states that the regulations do not prevent Haas from developing the property, even though the planned development cannot be undertaken. The opinion goes on to explain that just because Haas cannot recover its $2,000,000 investment under the existing zoning regulations means nothing more than the fact that Haas' property has been significantly diminished by the regulations. From that premise the Ninth Circuit goes on to infer that the fact that zoning restrictions prevent Haas from recovering its investment is of no concern and that Haas' inability to obtain a favorable return is nothing more than a recharacterization of the "diminution in value" principle.

This clear reluctance by the trial and appellate courts to properly consider the economic factors of investment recovery and return on money flies in the face and conflicts with *Penn Central* and other applicable decisions of this Court. As Justice Brennan points out at l.c. 136 of *Penn Central,* it is significant, but not dispositive, that the landowner can continue to use his property as he had in the past. One must look to the landowner's ability to obtain a "reasonable" not "favorable" return. Indeed with Haas,

the issue is whether or not there can be "any" return on its investment.

Because the Ninth Circuit decision in Haas conflicts with the applicable decisions of this Court, we urge this Court to exercise its supervisory powers and examine the issues raised herein.

II.

A Writ of Certiorari Should Issue Since the Court of Appeals for the Ninth Circuit in Sustaining the Trial Court's Order of Summary Judgment in Favor of Respondents on the Taking Issue Has Decided an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by This Court.

In *Goldblatt*, supra, Justice Clark acknowledged that there is no set formula for determining where a regulation ends and a taking begins. It is essentially a factual question of reasonableness.

Indeed the lack of a set formula has brought about several different and occasionally vague propositions in taking cases. In *Eldridge v. City of Palo Alto*, 129 Cal. Rptr. 575 (Cal. App. 1976), the focus was upon the proposition of whether or not the ordinance in question "precludes the use of the property for any purpose for which it is reasonably adapted". In several other cases led by *Goldblatt*, supra, the catch phrase is whether "any reasonable beneficial use of the land remains". Other cases focus in on the significance of the damage to the landowner as compared to the benefit being exacted by the public. *Barrett v. Hamby*, 219 S.E.2d 399 (Ga. 1976); *Bacich v. Board of Control of California*, supra. Still others focus on "remaining profitable use". *Steel Hill Development, Inc. v. Town of Sanbornton*, 338 F. Supp. 301 (D. N.H. 1972); *Arverne Bay Construction Co. v. Thatcher*, supra.

The lack of a set formula in the taking area as well as clear cut guidelines has presented much confusion which makes this issue ripe for the Court's examination. What is "a use of property for any purpose for which it is reasonably adapted"? What is a "reasonable beneficial remaining use" of land? What are "reciprocal burdens and benefits of regulations"? What is "economic feasibility" and what does it encompass? What is a "remaining profitable use" and what are the component factors in setting forth such a phrase? Simply put: When does a regulation end and a taking begin?

Because of this lack of a set formula, the remedy of summary judgment is and should be quite rare in taking cases. It is essential that the question of whether or not there has been a taking turn on the peculiar and unique factual circumstances of each case and not simply on general principles of law. *United States v. Central Eureka Mining Co.*, supra; *Penn Coal*, supra; *Aris Gloves Inc. v. United States*, 420 F.2d 1386 (Ct.Cl. 1970); *Eldridge v. City of Palo Alto*, supra; *Griffin v. United States*, 537 F.2d 1130.

As if the objective criteria when balanced were not enough to persuade this Court that Summary Judgment in favor of the City was inappropriate, the unique circumstances surrounding the factual background of this case present clear and convincing proof that genuine issues of material fact remain for a jury's determination. Such unique circumstances as the impact of the negligence of the public body in issuing the building site permit, the unforeseen judicial construction authorized by the state court on a relatively new act and the influence of such zoning raise questions of material fact that must be weighed and balanced by a jury.

Because the instant case presents such unique circumstances, this Court should once and for all provide clear guidance on the issue of precisely when a regulation ends and a taking begins.

CONCLUSION

For the reasons stated above, it is clear that the United States Court of Appeals for the Ninth Circuit has decided an important federal question in a manner which conflicts with the applicable decisions of this Court. It is also clear that an important question of federal law should be settled once and for all in this case. Therefore, this Court is urged to exercise its supervisory powers and grant the writ of certiorari requested herein.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 77-2486

WILLIAM C. HAAS & CO., INC.,
Appellant,

v.

CITY AND COUNTY OF SAN FRANCISCO,
CALIFORNIA,
Respondent.

Appeal from the United States District Court for the Northern District of California

OPINION

(Filed October 4, 1979)

Before: HUFSTEDLER and GOODWIN, Circuit Judges, and JAMESON,* District Judge

HUFSTEDLER, Circuit Judge:

William C. Haas & Co., Inc. ("Haas") brought this diversity action against the City and County of San Francisco ("City") claiming that the City's rezoning of its property and the imposition of other land use restrictions so far diminished the value of its property as to constitute a taking for which it is entitled to just compensation protected by the Fourteenth Amendment. The district court

*Honorable William J. Jameson, Senior United States District Judge, District of Montana, sitting by designation.

granted summary judgment in favor of the City, and Haas appeals. We uphold the district court because we conclude that (1) the land use restrictions imposed by the City upon Haas' property were not unconstitutional as applied to that property, and (2) the impairment of the economic value of the property, although substantial, was not sufficient to give rise to a constitutional claim to just compensation.

This controversy has a long history, punctuated by years of litigation before administrative agencies, and federal and state courts. On June 28, 1971, Haas entered a land purchase agreement to buy a large parcel of unimproved land in the Russian Hill neighborhood of San Francisco. The agreement was conditioned upon Haas' procurement of a valid site permit from the requisite city agency. When Haas first applied to the San Francisco Planning Commission for a site permit, on July 7, 1971, the property was zoned R-5, permitting the high-rise development that Haas proposed. The City Planning Commission denied the permit on the ground that the project would have a detrimental effect on the City as a whole and upon the residents and property of the neighborhood. The Commission also relied upon an "Urban Design Plan," containing general environmental policies for the City developed over several years to be included in the City's Master Plan. Haas appealed to the Board of Permit Appeals on August 13, 1971. Two weeks later, while the appeal was pending, the Commission formally adopted the Urban Design Plan as part of the Master Plan of San Francisco. On August 26, 1971, the Commission adopted interim controls establishing height and bulk restrictions which, among other things, limited the maximum height to 300 feet. Haas withdrew its appeal, and on November 9, 1971, submitted new plans for approval by the Commission. The new plans as amended complied with the 300-foot height

restriction as well as the bulk restriction. After a public hearing, the Commission approved the application for the site permit on the revised plans. The neighbors' efforts to stop the high-rise project failed when the Board of Permit Appeals, approving the permit, denied a petition for rehearing on April 10, 1972.

Pursuant to Haas' contract to purchase the land within seven days after the site permit became final, Haas paid $1,650,000 to the vendor of the property, and it also paid brokers' commissions, real estate taxes, and other fees of more than $165,000.

Haas immediately broke ground and commenced the construction project. The Russian Hill Improvement Association was equally prompt in taking steps to halt the project. On April 20, 1972, the Association filed a petition for writ of mandate in the Superior Court in San Francisco, Haas won the first round in the trial court, but the California Court of Appeal overturned the Superior Court and issued the writ on the ground that the permit was invalid for failure to comply with the California Environmental Quality Act of 1970 and the 1972 amendments thereto (Pub. Resources Code §§ 21000-21174). The California Court of Appeal held that Haas was not protected by the grandfather clause because Haas had not undertaken substantial construction and incurred substantial liabilities for construction in good faith reliance upon the issuance of a permit prior to the commencement of judicial proceedings. (*Russian Hill Improvement Association v. Board of Permit Appeals* (1974) 44 Cal. App. 3d 158, 164, 118 Cal. Rptr. 490.) Haas' efforts to foreclose application of the environmental laws to it on constitutional grounds failed in the California judiciary and in the United States Supreme Court. (*William C. Haas & Co., Inc. v. Russian*

Hill Improvement Association (1975) 422 U.S. 1030 (dismissing appeal for want of substantial federal question).)

With the invalidation of its site permit, Haas had to start all over again. By this time, however, Haas faced insurmountable barriers to its high-rise project because, in the interim, the City Planning Commission had adopted a 40-foot height limitation, promulgated density controls, and rezoned the property from R-5 to R-3.

Haas filed this case in the federal district court in April, 1975, in which it challenged the constitutionality of the rezoning and other land use restrictions as applied to its Russian Hill property, contending that the combined impact of the restrictions destroyed the value of the property and that it was entitled to over ten million dollars to compensate it for both the diminution in the value of the property and consequential damages flowing from frustration of its planned development.

Because we hold that, on the undisputed facts, Haas, as a matter of law, could not successfully maintain its inverse condemnation action, we do not reach any other issue in the case. It is therefore unnecessary for us to discuss the extent to which the judgment in the *Russian Hill Improvement Association* case precludes Haas from litigating its claim that it purchased the property and incurred contractual obligations to architects and construction companies in good faith reliance on the validity of the permit. We have no occasion to decide the correct measure of damages in an inverse condemnation action. Finally, we need not discuss California's interpretation of the doctrine of "taking" in an inverse condemnation context because controlling federal authority dooms Haas' action.

We do not separate Haas' attack on the constitutional validity of the zoning ordinance and the planned use regu-

lations as applied to its property and its claim that the combination of the ordinance and regulations constituted a taking because both contentions rest upon the same premise: The rezoning and land use restrictions imposed on Haas are so grossly disproportionate to the benefits conceivably inuring to the public in promoting the general welfare that the regulatory scheme, as applied to Haas constitutes an uncompensated taking, or, at the minimum, the record creates a triable issue of fact on the constitutional question.

As the City recognizes, governmental action in the form of regulation can "be so onerous as to constitute a taking which constitutionally requires compensation." (*Goldblatt v. Hempstead* (1962) 369 U.S. 590, 594.) Moreover, the Supreme Court has acknowledged that it "has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. *See Goldblatt v. Hempstead,* 369 U.S. 590, 594 (1962)." (*Penn Central Transportation Co. v. New York City* (1978) 438 U.S. 104, 124.)

Land use restrictions, reasonably related to the promotion of the health, safety, morals, or general welfare, have been repeatedly upheld even though the challenged regulations destroyed or adversely affected recognized real property interests or flatly prohibited the most beneficial use of the property. (*Penn Central Transportation Co. v. New York City, supra,* 438 U.S. at 125.) Haas necessarily agrees that the zoning and land use restrictions applied to its property did promote the general welfare by decreasing population density in the Russian Hill area, preserved light and air available to the neighbors, and served the aesthetic values enjoyed by the City as a whole.

Haas also recognizes that diminution of the value of its property by destroying its highest and best use by land use restrictions reasonably related to the general welfare cannot be the basis for a successful constitutional attack. Thus, accepting as true the valuation evidence most favorable to Haas, the value of its property was reduced from about $2,000,000 to about $100,000. Diminution of value on a similar scale was upheld in *Hadacheck v. Sebastian* (1915) 239 U.S. 394 (regulations reduced land value from $800,000 to $60,000). Haas has attempted to avoid the impact of *Hadacheck* by arguing that the nature, quality, and amount of benefit to the general welfare is inadequate constitutionally to offset the individual economic burden that the restrictions forced Haas to endure. We disagree.

"[D]ecisions sustaining other land-use regulations . . . reasonably related to the promotion of the general welfare, uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking,' [citations omitted] and that the 'taking' issue in these contexts is resolved by focusing on the uses the regulations permit." (*Penn Central Transportation Co. v. New York City, supra,* 438 U.S. at 131.) The regulations do not prevent Haas from developing the property, even though the planned development cannot be undertaken. Haas contends that its $1,900,000 loss in value of the property is not the full story because no use for the property remains which is "economically viable." (*Id.* at 138 n.36.) But Haas' argument that it cannot recover its $2,000,000 investment by constructing lowrise apartment units on the land merely restates the undisputed fact that the value of the property in Haas' hands has been significantly diminished by the regulations. That the zoning restrictions prevent Haas from recovering its investment does not mean that they are constitutionally defective. Of course, Haas would not have paid as much for the property as it did if it had known

that it would not be able to build highrises on it. But its disappointed expectations in that regard cannot be turned into a taking, nor can Haas transform a regulation into a taking by recharacterizing the diminution of the value of its property as an inability to obtain a favorable return on its investment.

Haas' property has not been singled out from other Russian Hill properties and made to bear a disproportionate economic burden. The record contains not the slightest suggestion that the land use regulations at issue involved "reverse spot" zoning. On the contrary, the land use controls were part of a comprehensive plan for the development of the City to preserve aesthetic values and other general welfare interests of the inhabitants. The land use restrictions "were reasonably related to the implementation of a policy . . . expected to produce a widespread public benefit and applicable to all similarly situated property." (*Id.* at 133-34 n.30.) All of Haas' neighbors are subject to the same restrictions upon the future development of their property as those imposed upon Haas. To be sure, at the moment, Haas appears to have suffered a disproportionate impact because no other affected landowner has as large a parcel of undeveloped land as does Haas. Nevertheless, all of the landowners in the Russian Hill area are no more able than is Haas to redevelop their property, either alone, or in combination with other landowners, for highrise apartments.

Haas has suffered a serious economic loss, and a frustration that is not equally borne by the owners of adjacent parcels. That the loss is heavy and that Haas must bear more than its proportionate share of the burden for the sake of the general welfare, however, did not convert the regulation into a taking.

AFFIRMED.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
C 75 0627 RFP

WILLIAM C. HAAS & CO., INC.,
Plaintiff,

vs.

CITY AND COUNTY OF SAN FRANCISCO,
Defendant.

ORDER

(Filed May 4, 1977)

This matter having been submitted to the Court for consideration and decision on the record and pleadings on file,

IT IS HEREBY ORDERED that defendant's motion for summary judgement is granted.

Dated: May 4th, 1977

/s/ Robert F. Peckham
Robert F. Peckham,
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA
No. C-75-0627 RFP

WILLIAM C. HAAS & CO., INC.,
a Missouri corporation,
Plaintiff,

v.

CITY AND COUNTY OF SAN FRANCISCO,
etc., et al.,
Defendants.

JUDGMENT

(Filed May 19, 1977)

This action came on for hearing before the court Honorable Robert F. Peckham, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that,

The plaintiff take nothing, that the action be dismissed on the merits, and that the defendant City and County of San Francisco recover of the plaintiff William C. Haas & Co. its costs of action.

Dated: May 19, 1977

/s/ Robert F. Peckham
United States District Judge

APPENDIX "C"

U.S.C. Const. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S.C. Const. Amend. XIV; Section 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fed. Rules Civ. Proc. rule 56(c), 28 U.S.C.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file,

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Supreme Court, U. S.
FILED
FEB 28 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1039

WILLIAM C. HAAS & CO., INC.,
Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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BRIEF FOR RESPONDENT IN OPPOSITION

The respondents, by their attorneys George Agnost, City Attorney for the City and County of San Francisco, and Burk E. Delventhal, Mark B. Kertz, Deputy City Attorneys, submit this brief in opposition to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeal is reported at 605 F.2d 1117 (1979) and is appended to the petition for a writ of certiorari.

JURISDICTION

Respondents do not question the jurisdiction as set forth in the petition. The Clerk of the Court has extended respondent's time in which to file a brief in opposition to and including February 27, 1980. Supreme Court Rule 34(5).

QUESTIONS PRESENTED

1. **Whether the United States Court of Appeals for the Ninth Circuit in sustaining the trial court's order of summary judgment holding that land use regulations which reduced the fair market value of the subject land but which still allowed reasonable uses of the property do not effect a taking of property within the meaning of the due process clause of the 14th amendment, has decided an important federal question in a manner which conflicts with applicable decisions of this court.**

2. **Whether the United States Court of Appeals for the Ninth Circuit in sustaining the trial court's order of**

summary judgment holding that land use regulations which reduced the fair market value of the subject land but which still allowed reasonable uses of the property do not effect a taking of property within the meaning of the due process clause of the 14th amendment, has decided an important question of federal law which has not been, but should be, settled by this court.

STATEMENT OF FACTS

On June 28, 1971, Haas entered a land purchase agreement to buy a large parcel of unimproved land in the Russian Hill neighborhood of San Francisco. The agreement was conditioned upon Haas' procurement of a valid site permit from the requisite city agency. When Haas first applied to the San Francisco Planning Commission for a site permit, on July 7, 1971, the property was zoned R-5, permitting the high-rise development that Haas proposed. The City Planning Commission denied the permit on the ground that the project would have a detrimental effect on the City as a whole and upon the residents and property of the neighborhood. The Commission also relied upon an "Urban Design Plan," containing general environmental policies for the City developed over several years to be included in the City's Master Plan. Haas appealed to the Board of Permit Appeals on August 13, 1971. Two weeks later, while the appeal was pending, the Commission formally adopted the Urban Design Plan as part of the Master Plan of San Francisco. On August 26, 1971, the Commission adopted interim controls establishing height and bulk restrictions which, among other things, limited the maximum height to 300 feet. Haas withdrew its appeal, and on November 9, 1971, submitted new plans for approval by the Commission. The new plans as amended complied with the 300-foot height restriction as well as the bulk restriction. After a public hearing, the Commission approved the application for the site permit on the revised plans. The neighbors' efforts to stop the high-rise project failed when the Board of Permit Appeals, approving the permit, denied a petition for rehearing on April 10, 1972.

Haas immediately broke ground and commenced the construction project. The Russian Hill Improvement Association was equally prompt in taking steps to halt the project. On April 20, 1972, the Association filed a petition for writ of mandate in the Superior Court in San Francisco, Haas won the first round in the trial court, but the California Court of Appeal overturned the Superior Court and issued the writ on the ground that the permit was invalid for failure to comply with the California Environmental Quality Act of 1970 and the 1972 amendments thereto (Pub. Resources Code §§ 21000-21174). The California Court of Appeal held that Haas was not protected by the grandfather clause because Haas had not undertaken substantial construction and incurred substantial liabilities for construction in good faith reliance upon the issuance of a permit prior to the commencement of judicial proceedings. (*Russian Hill Improvement Association* v. *Board of Permit Appeals* (1974) 44 Cal. App. 3d 158, 164, 118 Cal. Rptr. 490.) Haas' efforts to foreclose application of the environmental laws to it on constitutional grounds failed in the California judiciary and in the United States Supreme Court. (*William C. Haas & Co., Inc.* v. *Russian Hill Improvement Association,* (1975) 422 U.S. 1030 (dismissing appeal for want of substantial federal question).

While the issue of petitioner's compliance with the California Environmental Quality Act of 1970 and as amended, was before the California Court of Appeal, the City Planning Commission had adopted a 40-foot height limitation, promulgated density controls, and rezoned the property from R-5 to R-3.

Petitioner then filed this case in the federal district court in April, 1975, in which it challenged the constitutionality of the rezoning and other land use restrictions as applied to its Russian Hill property, contending that the combined impact of the restrictions destroyed the value of the property and that it was entitled to over ten million dollars to compensate it for

both the diminution in the value of the property and consequential damages flowing from frustration of its planned development.

The federal district court granted respondent's Motion for Summary Judgment. Petitioner filed, in timely fashion, a Notice of Appeal for the Ninth Circuit.

The United States Court of Appeals for the Ninth Circuit (hereinafter Ninth Circuit) entertained both written and oral argument. The Ninth Circuit affirmed the judgment of the district court holding that "on the undisputed facts, Haas, as a matter of law, could not successfully maintain its inverse condemnation action. . ." 605 F.2d 1117 at 1119.

Petitioner then petitioned this Court for a writ of certiorari to the Ninth Circuit.

ARGUMENT

I.

PETITIONER HAS NOT PRESENTED QUESTIONS UNDECIDED BY THIS COURT, OR FOR WHICH A CONFLICT BETWEEN THE COURTS EXIST.

This Court should not grant certiorari because petitioner has not presented issues involving special and important federal questions requiring a new or different interpretation by this Court.

This Court's own Rule 19(b), a guideline for determining whether to grant a writ of certiorari, provides, in relevant part:

> Where a court of appeals . . . has decided an important question of federal law which has not been but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of the court's power of supervision.

The questions presented by petitioner are not ones which have "not been but should be settled by this Court." Rule 19. This Court has considered the question of when a state enacted land use regulation amounts to a taking since the late 19th century. *Mugler* v. *Kansas,* 123 U.S. 623 (1887). This Court has considered the use of comprehensive zoning ordinances for over 50 years. *Euclid* v. *Ambler Realty Co.,* 272 U.S. 365 (1926).

In resolving this case the courts below fully considered the applicable decisions of this Court. The Ninth Circuit reaffirmed this Court's established holding that the adoption of a land use regulation within the state's police power does not amount to a taking for which compensation must be made. Writ of certiorari should be granted only when the decision of the lower court(s) is in direct conflict with applicable decisions of this Court.

Respondents have received a copy of a letter from Petitioner addressed to the Clerk of this Court, dated January 9, 1980, requesting the Clerk to bring "to the immediate attention of the Court" petitioner's claim that the questions presented in *Agins* v. *City of Tiburon, California,* (1979) 23 Cal.3d 605, are "obviously parallel" to the instant case.

Agins v. *City of Tiburon* is inapposite to the questions presented in the case at hand. The question in *Agins* was whether a state court holding declaratory relief or mandamus the exclusive remedy for a landowner who claims that a land use regulation has unreasonably restricted his property rights violates the due process clause of the 14th amendment.

The Supreme Court of California decided that "inverse condemnation is an inappropriate and undesirable remedy in cases in which unconstitutional regulation is alleged." 23 Cal.3d 605 at 614. Instead, according to the court in *Agins,* a landowner may attempt through declaratory relief or administrative mandamus to invalidate the ordinance as excessive regulation in violation of the 14th amendment of the U.S. Constitution and Art. I Section 19 of the California Constitution.

The court in *Agins* did not consider whether a 'taking' had occured (albeit it hinted that it had not). The question was only which remedy was available to the plaintiff Agins. The questions presented here by petitioner Haas are concerned with a different issue: the existence or not of a 'taking'. Therefore *Agins* does not provide a reason for granting the writ.

II.

THE REGULATIONS IN QUESTION DO NOT CONSTITUTE A TAKING

A. Historical Background of the "Taking Clause" of the Fifth Amendment as Incorporated by the Fourteenth Amendment.

In order properly to understand the question in the instant case, it is appropriate to examine the historical basis of the Fifth Amendment of the United States Constitution which provides in relevant part "Nor shall private property be taken for public use, without just compensation."

In drafting the Fifth Amendment the founding fathers indicated no concern for the power of the state to impose land use regulations. During the first half of the nineteenth century the Fifth Amendment was interpreted to limit the concept of a "taking" to the physical taking. See William B. Stoebuck "A General Theory of Eminant Domain" 47 Wash. L.Rev. 553, 575 (1972). See also *Commonwealth* v. *Alger* 7 Cush. 53 (Mass. 1853); *Baker* v. *Boston* 12 Pick 183 (Mass.) (1831).

Early U.S. Supreme Court decisions accorded equally broad power to the legislature to impose land use regulations. See *CB&Q* v. *Chicago* 160 U.S. 26 (1890) (incorporating the taking clause of the Fifth Amendment into the due process clause of the Fourteenth Amendment); *Transportation Co.* v. *City of Chicago* 99 U.S. 635 (1878) and *Richmond Fredericksburg & Potomac Ry. Co.* v. *Richmond* 96 U.S. 521 (1877) upholding a regulation which prohibited the operation of railroad or public streets. Said the court at 528-529,

> "The power to govern implies the power to ordain and establish suitable police regulations... Appropriate regulation of the use of property is not a 'taking' of property, within the meaning of the constitutional prohibition."

The leading early case was *Mugler* v. *Kansas* 123 U.S. 623, 8 S.Ct. 273 (1887) in which P owned a brewery which, by virtue of state prohibition, was rendered worthless. Said the court at 668-669,

> "A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. *Such legislation does not disturb the owner in the control or use of his property for lawful purposes,* nor restrict his right to dispose of it, *but is only a declaration by the state that its use by anyone, for certain forbidden purposes, is prejudicial to the public interests.* Nor can legislation of that character come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law."

The police power must not be "burdened" with requirements of compensation, suggested Harlan:

> "The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other,

unoffending property is *taken away* from an innocent owner." (emphasis added)

Thus deeply imbedded not only in our law but also in the common law of England is the principle that all private property is held subject to the power of the state to regulate its use for the commonweal. This perspective of the accommodation between private interest and the public will compels the conclusion that the regulations in the instant case have not exceeded the strictures of the due process clause.

In the case of *Hudson Water Co.* v. *McCarter* 209 U.S. 349 (1908) Mr. Justice Holmes writing for the court stated in very broad terms that substantial powers were vested in the government in the area of environmental protection. Said the court at pages 355-357,

> "It sometimes is difficult to fix boundary stones between the private right of property and the police power when, as in the case at bar, we know of few decisions that are very much in point. *But it is recognized that the state, as quasi-sovereign and representative of the interests of the public, has a standing in court to protect the atmosphere, the water, and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned.*
>
> "*We are of opinion, further, that the constitutional power of the state to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs.* The legal conception of the necessary is apt to be confined to somewhat rudimentary wants, and there are benefits from a great river that might escape a lawyer's view. But the state is not required to submit even to an aesthetic analysis. Any analysis may be inadequate. It finds itself in possession of what all

> admit to be a great public good and what it has it may keep and give no one a reason for its will." (emphasis added)

And in *Pennsylvania Coal* v. *Mahon* 260 U.S. 393 (1922) Mr. Justice Holmes stated,

> "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in general law."

And in *Tyson Bros.* v. *Banton* 273 U.S. 418, 446 (1926) the court noted at " . . . Property rights may be taken for public purposes without paying if you do not take too much [since] some play must be allowed to the joints if the machine is to work."

Appellant refers repeatedly to the fact that there is no fixed rule and that each case must be decided on its own facts. However, this does not change the fact that on *undisputed* facts whether there is a taking is purely a question of law. The uncontroverted factual material developed in the trial court, uncontroverted by petitioner below established repondent's entitlement as a matter of law to a judgment.

B. Recent Interpretations of the "Taking Clause."

As noted above the federal government under the Fifth Amendment and the states under the Fourteenth Amendment to the United States Constitution may regulate the use of private property provided such regulation is reasonably related

to the public health, safety, morality or general welfare. *Goldblatt* v. *Hempstead* 369 U.S. 570, 8 L.Ed2d 130, 82 S.Ct. 987.[1][2]

For the purposes of the instant inquiry the question is whether the regulation has gone so far as to constitute a taking. In *Pennsylvania Coal Co.* v. *Mahon* 260 U.S. U.S. 393, 67 L.Ed. 322, 43 S.Ct. 158 (1922) (hereinafter referred to as *Penn Coal*). The Court in characteristically aphoristic language stated,

> "The general rule is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

[1] The Fifth Amendment to the United States Constitution provides in relevant part, ". . . nor shall private property be taken for public use without just compensation . . ." The Fourteenth Amendment's due process clause has been held to incorporate the same proscriptions. *Chicago Burlington & Quincy Ry.* v. *Chicago* 166 U.S. 26 (1896). The California Constitution's provisions provide more protections to the property owner. Article I, section 7(a) provides ". . . . due process of law . . ." Article I, section 19 of the California Constitution provides in relevant part, "Private property may be taken or *damaged* for public use only when just compensation . . . has first been paid . . ." (Emphasis added.) The fact that the California Constitution requires compensation in the event either of the taking or a damaging renders California authorities on when compensation is required even more compelling in light of the fact that California accords by virtue of its own constitution broader protections than are accorded to property owners under the Fourteenth Amendment of the United States Constitution.

[2] There is an important distinction to preserve between whether a zoning regulation is reasonably related to a permissible public purpose (resolved in favor of respondent by the Ninth Circuit and not argued by petitioner before this Court) and the issue now to be addressed as to whether the regulation constitutes a taking. *Nectow* v. *Cambridge* 277 U.S. 183, 188, 72 L.Ed. 842, 844, 48 S.Ct. 447 (1928). In the *Nectow* case the Court never addressed the taking issue ruling that the private burden on the individual property owner so far outweighed the public benefit to be derived from the regulation as to render the regulation unreasonable.

In equally unhelpful language the Court in 1962 upheld regulations on gravel removal stating in *Goldblatt* v. *Hempstead* 369 U.S. 590, 8 L.Ed.2d 130, 133-134, 82 S.Ct. 987,

> "This is not to say, however, that governmental action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation."

And then the court in *Goldblatt* stated at page 134,

> "There is no set formula to determine where regulation ends and taking begins. Although comparison of values before and after is relevant, it is by no means conclusive . . . How far a regulation may go before a taking we need not now decide . . ."

So the trial court's problem in this case was to decide how far was too much and then to determine whether on uncontroverted facts the City was entitled, as a matter of law, to judgment.

Initially some aid in understanding Mr. Justice Holme's comments in the *Penn Coal* case can be found in a review of *Hudson Water Co.* v. *McCarter* (supra) 209 U.S. 355 in which Mr. Justice Holmes writing for the court stated,

> "The limits set to property by other public interests present themselves as a branch of what is called the police power of the State. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side. *For instance, the police power may limit the height of buildings, in a city, without compensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of*

> *property would prevail over the other public interest, and the police power would fail. To set such a limit would need compensation and the power of eminent domain.* (Emphasis added)
>
> It sometimes is difficult to fix boundary stones between the private right of property and the police power when, as in the case at bar, we know of few decisions that are very much in point." [Emphasis added.]

Therefore one point "in the line" "fixed by decision" relates to height limits on buildings and holds that there is not a taking unless the City "should attempt to limit the height so far as to make an ordinary building lot wholly useless . . ." The second amended complaint concedes and the declaration of Robert Passmore emphasizes that there is a plethora of permitted uses which render specious and erroneous as a matter of law any claim that the parcel in question has been made wholly useless. That impairment of value in and of itself is not enough to constitute a taking has been reaffirmed in many cases. See *Euclid* v. *Ambler Realty* 272 U.S. 365, 384 (1926) holding valid a zoning regulation in spite of the fact that the value of the affected land declined from $10,000 to $2,500 per acre.

The court's discussion of the rationale for the legislation is prophetic not only in the context of the Village of Euclid but also for the purposes of the instant case where plaintiff claims entitlement to erect a three hundred foot structure in the middle of a residential neighborhood.[3]

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[3] Appellant claims either that he is entitled to erect the structure or that he is entitled to compensation for a taking. That these alternative contentions offer the City a classic Hobson's choice cannot be gainsaid. Should the City be required to compensate every property owner for the decline in value of his property due to stricter regulations on intensity of use, the City would be compelled to abandon all attempts at land use regulation.

Said the court in *Euclid at* 277 U.S. 365, 394-395,

> "These reports, which bear every evidence of painstaking consideration, concur in the view that the segregation of residential, business and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life; greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections; decrease noise and other conditions which produce or intensify nervous disorders; preserve a more favorable environment in which to rear children, etc. With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; *that in such sections very often the apartment is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities,—until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances,* [395] *apartment houses,*

which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances.

If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.[4]

See also *Hadacheck* v. *Sebastian* 239 U.S. 394, 60 L.Ed. 348, 36 S.Ct. 143 (1915) in which the Court upheld a land use regulation which resulted in a diminution in value from $800,000 to $60,000. And in *HFH Ltd.* v. *Superior Court* 15 Cal.3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975) cert. denied 425 U.S. 904 the Court upheld the regulation notwithstanding declining value from $400,000 to $38,000.

The Penn Coal case must be read both in the context of other cases of that era and in recognition of the unique facts of that case which dealt not with the traditional accommodation of private and public interests inherent in the exercise of the policy power.[5] On the contrary this case involved a specific property

[4] It is recognized that the Euclid case dealt primarily with the claim that the legislation in question was an arbitrary exercise of the police power and therefore its enforcement could be enjoined. And the taking issue was not raised. However, since the Euclid case followed closely the Penn Coal case, since it involved a claim of substantial reduction in value by virtue of the zoning regulation, and since it involved the first case in which the Supreme Court reviewed a comprehensive zoning regulation, it is significant that the court, having ruled the regulation to be a valid exercise of the police power did not consider as meriting attention the possible contention that the property had been taken from a private owner for public purposes.

[5] Once cave-ins began in the Penn Coal case no further mining would be allowed. Thus the reserved mining right, the only interest

(footnote continued on following page)

right reserved by a grantor and a state statute which inevitably would render that property worthless.[6]

In addition to the Penn Coal case, appellants have relied on *Nectow* v. *Cambridge* (supra) 277 U.S. 183, to support their contention that the trial court erred in concluding that there has been no taking. The Nectow case turned on the determination of the trial court noted at 277 U.S. 187,

> ". . . that the districting of the plaintiff's land in a residence district would not promote the health, safety, convenience and general welfare of the inhabitants of that part of the defendant City, taking into account the natural development thereof and the character of the district and the resulting benefit to accrue to the whole city . . ."

It is clear that the Nectow case turned on the question of the rationality of the exercise of the police power and not on the taking issue.

Appellants place great reliance on another finding of the special master appointed by the trial court noted at 277 U.S. 187,

> " 'that no practical use can be made of the land in question for residential purposes, because among

(footnote continued from previous page)
reserved, was rendered totally worthless. In an industrial, capitalistic society, where the private right to expropriate and exploit natural resources (especially energy resources) is considered sacrosanct, the result in the Penn Coal case is not surprising. Also with still large, untapped reserves of open space, this country was hardly concerned in 1927 with the preservation of living environments. The disaffected citizens indulged in the traditional hegira to the west. Now we in the west are shouldered with the burdens of over-population. There is no more open space and there is no room for westward migration. Therefore, attention must be directed at preserving existing open space.

[6] There is no claim in the instant case that the property has been rendered worthless.

> other reasons herein related, there would not be adequate return on the amount of any investment for the development of the property.' . . .

A reading of the *Nectow* decision clarifies its critical element as,

> "Here, the express finding of the master, already quoted, confirmed by the court below, is that the health, safety, convenience and general welfare of the inhabitants of the part of the city affected will not be promoted by the disposition made by the ordinance of the locus in question. This finding of the master, after a hearing and an inspection of the entire area affected, supported, as we think it is, by other findings of fact, is determinative of the case. That the invasion of the property of plaintiff in error was serious and highly injurious is clearly established; and, since a necessary basis for the support of that invasion is wanting, the action of the zoning authorities comes within the ban of the 14th Amendment and cannot be sustained."

In other words, both the special master and the trial court found that the legislative calculus leading to the promulgation of the regulations was totally erroneous and that there was no basis in reason for the conclusions set forth in the regulations in question.

These cases stand neither for the proposition that a fact question is always presented when an exercise of the police power had been challenged or that the particular legislation in question constitutes a taking or is otherwise unreasonable.

III.

THE PROFITABILITY OF PERMITTED USES IN LIGHT OF THE COST OF PROPERTY AND AMOUNT SPENT IN PREPARATION FOR DEVELOPMENT IS NOT A PROPER BASIS FOR DETERMINING WHETHER THERE HAS BEEN A TAKING

In this section respondent addresses what constitutes the central issue in this case. Throughout appellant has contended in various ways that there has been a taking of his property for which compensation is required because, in light of what was paid for by the property and invested in preparation for development, no permitted use will enable appellant to recover his investment.

Profitability (return on investment to owner) may be an element of the calculus in arriving at a determination of whether there is some basis in reason for a zoning regulation. However, profitability should play no role in arriving at a determination as to whether a reasonable regulation adopted pursuant to the police power constitutes a taking. As noted above the issue in the Nectow case from which appellant draws the language relating to profitability was mentioned in the context of the claim that the legislation was arbitrary and unreasonable. Furthermore that language was just one factor in a decision and must not be considered controlling.

From the point of view of the administration of justice, such a rule of law could lead to unfair results. A property owner's claim that his property has been "taken" in that the zoning regulation is unreasonable should not turn on how much that property owner paid for his property. Otherwise, long-term property owners would be compelled to sell their property on the eve of the imposition of more restrictive zoning regulations for an inflated price (reflecting value under existing permitted uses) to a developer who could, in turn, subsequently contend that he is entitled either to an exemption from the

zoning regulations or to compensation for the taking of the property. The City's zoning regulations either would be fatally eviserated of their effectiveness as vehicles of land use reform or so costly as to render unfeasible land use reform directed toward preservation and enhancement of the living environment.

Petitioner ardently proffers *Penn. Central Transportation Co.* v. *New York City,* 438 U.S. 104 (1978), citing *Hadacheck, Nectow, Penn Coal,* and *Goldblatt* therein, as reaffirmation of the crucial, if not decisive, role of the diminished investment value theory.

Penn. Central involved a "comprehensive program to preserve historic landmarks and historic districts . . . [containing] structures with special historic, cultural, or architectural significance . . ." 438 U.S. 107, 108. According to Petitioner Penn. Central stands for the proposition that in determining whether there is a taking under the 14th Amendment's Due Process Clause this court must look beyond the magnitude of the loss of the owner under The Landmark Law, and consider the "reasonable return" (Br. at 17) possible on the property.

The term "reasonable return" was employed by the New York Court of Appeals in its review of the case below. The Court of Appeals in its employ of the term "reasonable return" 42 NY2d 324,333, 366 N.E. 2d 1271 at 1276, was discussing not the ability of the terminal to turn a profit (Petitioners there claimed it was operating at a loss even before the landmark designation) but whether the property was capable of making a reasonable return. Id. Further, reasonable return was not deemed to mean a profit acceptable to a large corporation, but an amount of return which could not be classified a denial of all reasonable return. Id. at 1273. The Court of Appeals stated at p. 1273 that " . . . government regulation is invalid if it denies a property owner all reasonable return. . ."

The term "reasonable" was further limited by that court where, at page 1273, it stated that : ". . .there is no constitutional imperative that the return embrace all attributes incidental influences, or contributing external factors derived from the social complex in which the property rests."

Therefore the term "reasonable return" does not relate to profit possible from the highest and best investment use of the property but rather to the capability of the property to produce some return as opposed to a denial of all reasonable return, without regard to profit.

In *Penn. Central,* supra 433 U.S. at 123, this court did "Review the factors that have shaped the jurisprudence of the Fifth Amendment . . . " This Court noted as factors: economic impact on the owner, the nature of the government action, i.e. physical invasion of the property or regulation, the effect on the health, safety, morals or general welfare of the public as understood in the police power, and zoning laws.

This Court in *Penn. Central* supra noted that when the land use is restricted under the police power the factor considered most improtant is whether the police power is served. If the police power is served then the regulation will usually be upheld. This Court said in *Penn. Central* supra 433 U.S. 125:

> More importantly for the present case, in instances in which a state tribunal reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulation that destroyed or adversely affected recognized real property interests.

This Court also reaffirmed in *Penn Central,* supra at 125, that:

> Zoning laws generally do not affect existing uses of real property, but 'taking' challenges have also been held to be without merit in a wide variety of situations when the challenged governmental actions

> prohibited a beneficial use to which individual parcels had previously been devoted and thus caused substantial individualized harm.

Petitioner argues that its ". . .basic concept of land purchase is to buy land at a cost commensurate with the proposed construction," (Br. at 11) and that the price paid for the land was commensurate with a proposed highrise development. Petitioner argues that the height restrictions enacted by the city unreasonably reduce petitioner's hoped for return on investment. This Court in *Id.* at 130, explicitly rejected that argument:

> ". . .the submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable. Were this the rule, this court would have erred not only in upholding laws restricting the development of air rights. . .but also in approving those prohibiting both the subjacent [citing Goldblatt] and the lateral development of particular parcels.

Petitioner Haas also argues that the regulations enacted by respondent effected a taking because its operation significantly diminished the value of the affected land, (BR. at 11). An identical argument was raised in *Penn. Central,* 438 U.S. at 131. This court noted, and appellant *Penn. Central* conceded ". . .that the decisions sustaining other land-use regulations which are . . . reasonably related to the promotion of the general welfare uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking'. . . the 'taking' issue . . . is resolved by focusing on the uses the regulations permit."

The arguments presented by petitioner Haas (along with several others no longer raised by Petitioner) were considered by the court below. The Ninth Circuit found (and Haas was

held "necessarily [to] agree") that "the zoning and the land use restrictions applied to its property did promote the general welfare by decreasing population density . . . preserved light and air available to neighbors and served the aesthetic values enjoyed by the City as a whole. *William L. Haas* v. *City and County of San Francisco,* 605 F.2d at 1120

IV

On the record before them, the trial and Ninth Circuit counts below properly concluded there was no genuine issue as to any material fact and that the land use regulation in question was a valid exercise of the police power. The loss occasioned on petitioner by virtue of the imposition of the regulation was insufficient to justify the conclusion that its property had been taken within the meaning of the due process clause of the 14th Amendment. The Ninth Circuit, *Id.* at 1120 noted that "Haas also recognizes that dimunition of the value of its property by destroying its highest and best use by land use restrictions reasonably related to the general welfare cannot be the basis for a successful constitutional attack." Nor did the Court of Appeals at p.1120 find for petitioner's claim that ". . . the nature, quality and amount of benefit to the general welfare is inadequate constitutionally to offset the individual economic burden . . ." Haas has to endure.

That court stated at 605 F.2d at 1120 that petitioner could still develop the property, albeit not as it planned. Petitioner's property had also "not been singled out from other Russian Hill properties and made to bear a disproportionate economic burden." All of petitioner's neighbors were subject to the same restrictions. Petitioner has suffered an economic loss, but although heavy it "did not convert the regulation into a 'taking.'" 605 F.2d at 1121

V.

THE COURT OF APPEALS FOR THE NINTH CIRCUIT PROPERLY SUSTAINED THE TRIAL COURT'S ORDER OF SUMMARY JUDGMENT IN VIEW OF UNCONTROVERTED FACTS AND SETTLED AND ESTABLISHED LAW.

The second issue is whether the trial court on uncontroverted facts, properly concluded, as a matter of law, that appellant could not overcome the constitutional presumption and sustain his burden of proving that the limitations on height of structures and density were "without any reasonable basis and therefore purely arbitrary," while recognizing that ". . . it is not enough that the measure in question results in some inequality or that it is not drawn with mathematical nicety." *Lindsley* v. *Natural Carbonic Gas Co.* 270 U.S. 61, 65 (1910).[7]

In light of the burden of proof and the correlative constitutional presumption involved in these cases, it is clear that the trial court and the Ninth Circuit properly ruled below that

[7] In fact this aspect of the case does not present an evidentiary question in the classic, summary judgment sense. As noted in *McGowan* v. *Maryland* 366 U.S. 420, 42526, 6 L.Ed.2d 393, 399 (1966),

> "Although no precise formula has been developed the court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside *if any state of facts reasonably may be conceived to justify it.*" (Emphasis added.) (Citations omitted.)

This language clearly demonstrates that the presumption is not merely an evidentiary one, but rather is constitutional in dimension. The court is enjoined to ferret out any factual basis that can be *conceived* (rather than proved) to justify the legislation.

there was no triable issue of fact regarding the rationality of the zoning regulations in question. The essential fact before the courts below were uncontroverted by petitioner. The Ninth Circuit followed the holding in *Penn Central Transportation Co.* v. *New York City,* 438 U.S. 104, at 125 that:

> Land use restrictions, reasonably related to the promotion of the health, safety, morals, or general welfare, have been repeatedly upheld even though the challenged regulations destroyed or adversely affected recognized real property interests or flatly prohibited the most beneficial use of the property.

The Ninth Circuit held and "Haas necessarily agrees" 605. F2d. at 1120, that the regulations were reasonable in that they:

> . . . promote[d] the general welfare by decreasing population density in the Russian Hill area, preserved light and air available to the neighbors, and served the aesthetic values enjoyed by the City as a whole. . . .
>
> Haas' property has not been singled out from other Russian Hill properties and made to bear a disproportionate economic burden. The record contains not the slightest suggestion that the land use regulations at issue involved 'reverse sopt' zoning. On the contrary, the land use controls were part of a comprehensive plan for the development of the City to preserve aesthetic values and other general welfare interests of the inhabitants. The land use restrictions 'were reasonably related to the implementation of a policy. . . expected to produce a widespread public benefit and applicable to all similarly situated property.' [citing Penn Central at 133]. All of Haas' neighbors are subject to the same restrictions upon the future development of their property as those imposed on Haas. To be sure, at the moment, Haas appears to have suffered a disproportionate impact

> because no other affected landowner has as large a parcel of undeveloped land as does Haas. Nevertheless, all of the landowners in the Russian Hill area are no more able than is Haas to redevelop their property, either alone, or in combination with other landowners, for high-rise apartments.

The complaint originally submitted, it is contended by respondent, could have been resolved on a motion to dismiss in that the trial court easily could have conceived of some rational explanation for the height and density limits in question (not to mention the total absence in the plaintiff's complaint of any evidentiary allegations regarding the irrationality of the legislation.[8])

The federal judiciary has recently ruled "conclusory allegations, unsupported by factual data do not create a triable issue of fact." *California ex rel Department of Transportation* v. *United States,* 561 F.2d 731, 733 n.4 (9th Cir. 1977), and *King* v. *Fom Inv. Corp,* 563 F.2d 1316 (9th Cir. 1977)

This rule is even more applicable where the court is called upon by the complaint to invalidate the regulations of a co-equal branch of government.

Petitioner does not allege conflict as to the facts in this case, only that the issue of 'taking' should not be decided by an Order of Summary Judgment.

Rule 56 of the Federal Rules of Civil Procedure provides, in relevant part, that if the records and affidavits, if any:

> show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law.

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[8] The petitioner seemed to premise his contention on the fact that he had been granted a permit earlier on to do that which subsequently adopted regulations proscribed. Every reform has a date of inception and, if meaningful, substantially changes the ground rules. The fact of the cut off point hardly can be said to render the legislation invalid.

The motion for summary judgment lies whenever there is no genuine issue as to any material fact. The court does not try issues of fact; it only determines whether there are issues to be tried. *Pepper and Tanner, Inc.* v. *Shamrock Broadcasting, Inc.* 563 F.2d 391 (9th Cir. 1977).

This procedure empowers the court to render a judgment on the law when no disputed facts exist. See *General Electric Co.* v. *U.S. Dynamics, Inc.* 403 F.2d 933 (1st Cir. 1968) where the court held at p. 934 (with unusual poetics) that summary judgment was:

> available only when the effluent stream of controversy has been purified by the exclusion of any genuine issues of material fact.

The test for summary judgment at the trial court level is rigorous. It was perhaps best stated in *Fili Morelti Cereali* v. *Continental Grain Co.,* 563 F.2d 563, 565 (2d Cir. 1977) citing in part *Heyman* v. *Commerce and Industry Ins. Co.,* 524 F.2d 1317 (2d Cir. 1975). The trial court is required to:

> resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgment is sought [citation omitted], with the burden on the moving party to demonstrate the absence of any material fact genuinely in dispute.

In *Pepper,* supra, it was held at p. 393, that the trial court could not enter a summary judgment which "rests on a chain of inferences from subsidiary facts not conclusively established on the record."

The Ninth Circuit in reviewing the grant of summary judgment by the trial court was required to apply the same test initially employed by the trial court. *Radobenko* v. *Automated Equip. Corp*, 520 F.2d 540 (9th Cir. 1975).

In applying the test the Ninth Circuit was required to review the evidence and when inferences were to be drawn therefrom to do so in the light most favorable to petitioner here.

Id. at 543. The Ninth Circuit considered the proceedings and evidence below and found respondent entitled to prevail as a matter of law.

Petitioner does not allege a conflict of material fact. Instead, petitioner claims that the standards employed by this Court since *Penn Coal* v. *Mahon,* supra, are so undefined that they can not be employed to decide a motion for summary judgment. (Br. at 21)

Petitioner confuses the distinction between matters of law and fact. Petitioner stated at page 21 of its brief: "It is essential that the question of whether there has been a taking turn on the peculiar and unique factual circumstances of each case and not simply on general principles of law."

The summary judgment granted below was ordered precisely because there was "no genuine issue of a material fact." FRCP 56. Therefore, presentation of the case to a jury was unnecessary and contrary to the very purpose of Rule 56.

Petitioner should not be permitted now to argue that the weight of the facts does not support an order of summary judgment, and also argue that there is no precise standard as a matter of law to apply to those facts. This Court has decided cases on comprehensive zoning since 1926; standards are well understood by the courts below. Therefore, summary judgment as a remedy should not be considered "quite rare in taking cases" (Br. at 21). The facts are uncontroverted and the standards established over 50 years ago. What petitioner overlooks in its argument is that on uncontroverted facts the trial court's analysis of the issues involved solely a question of law.

The issues in this case were analyzed by the trial court and the Ninth Circuit. In each instance the courts below concluded that those uncontroverted facts did not amount to a taking. What other facts conceivably might have been produced were petitioner to have another chance to try the case is immaterial.

The trial court, in its consideration of respondent's motion for summary judgment rendered its judgment on the record before it. This is the precise nature of the summary judgment proceeding. Petitioner's insistence on the need for a trial misapprehends the basic concept of a summary judgment proceeding.

CONCLUSION

The court below determined correctly that the respondent's motion for summary judgment should be granted. The Petitioner failed to provide the courts below with any contradictory facts to sufficiently raise any material issue of fact and the applicable law on the specific legal issues raised is such that a determination in favor of the respondents was necessary.

The fact that no question has been presented here which this Court has not already long decided upon, or is a matter of conflict between the several courts below, no writ of certiorari should be granted.

Dated:

Respectfully Submitted,
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